FILE COPY

Office Supreme Court, U.S.
FILED
NOV 28 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 476.

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, Deceased, and CHOICE EMBROIDERY & LACES, INC.,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

Respondents.

BRIEF OF BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. WELLES HENDERSON, JR.,
ROBERT E. JONES,
1910 Packard Building,
Philadelphia, Penna.,

E. N. CARPENTER, II,
LOUIS J. FINGER,
WILLIAM E. WIGGIN,
4072 du Pont Building,
Wilmington, Delaware,

Counsel for Respondent Beech Aircraft Corporation.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
A. Opinions Below	1
B. Question Presented	1
C. Counter-Statement of the Case	3
1. Introduction	3
2. Airplane Design Necessarily a Compromise	4
3. Instrument Flying (Weather Flying) and Vertigo	7
4. "Clean" and "Dirty" Airplanes	8
5. Knowledge of Prashker and Warnings by Beech	9
6. The Accident	10
D. Summary of Argument	13
E. Argument	19
I. The Unanimous Decision of the Two Lower Courts on the Insufficiency of the Evidence Should Not Be Reviewed by This Court	19
II. The Direction of a Verdict in This Case Was Clearly Correct	22
A. As to Contributory Negligence (Pet. pp. 15-18)	22
B. As to Negligence	28
1. Alleged Negligent Design (Pet. pp. 22-24)	28
2. Alleged Failure to Warn (Pet. pp. 19-22)	32
III. Evidence of Prior Accidents and Statistics Was Properly Excluded as Irrelevant, as Well as on Other Grounds; and Would Have Added Nothing to Petitioners' Case	34
A. As to Prior Accidents	34
B. As to Statistics	38
IV. The Decision Below Is Confined to the Facts of the Present Case, Does Not Adversely Affect the Rights of Other Litigants, and Is Not Based Upon the Findings of an Administrative Agency	41
F. Conclusion	43

TABLE OF CASES CITED.

Page

Allen, 13 CAB Rep. 375 24

Anderson, Adm'x v. Atlantic Coastline Railway Co., 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955) 21

Antonelli v. Tumolo, 390 Pa. 68, 132 A. (2d) 285 (1957) 20

Barie v. Superior Tanning Co., 182 F. (2d) 724 (7th Cir. 1950) 2

Baugham v. N. Y., Phila. & Norfolk R. R., 241 U. S. 237, 36 S. Ct. 592, 60 L. Ed. 977 (1916) 21

Boehmer v. Pa. R. R. Co., 252 U. S. 496, 40 S. Ct. 409, 64 L. Ed. 680 (1920) 21

Bullen v. DeBretteville, 239 F. (2d) 824 (9th Cir. 1956) 2

Byrd v. Blue Ridge Cooperative, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. (2d) 953 (1958) reh. den. 357 U. S. 933, 78 S. Ct. 1366, 2 L. Ed. (2d) 1375 (1958) 19

Carver, 13 CAB Rep. 277 25

Cities Service Co. v. Dunlap, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939) 19, 20

DeFonde v. Keystone Valley Coal Co., 386 Pa. 433, 126 A. (2d) 429 (Sup. Ct. 1956) 36

Dimenco v. Pa. R. R. Co., 19 F. R. D. 499 (D. C. Del. 1956) 38

Erie Railroad Company v. Welsh, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319 (1916) 21

Gibson v. Phillips Petroleum Company, 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. (2d) 77 (1956) 20, 21

Gillis v. N. Y., N. H. & H. R. R. Co., 249 U. S. 515, 39 S. Ct. 355, 63 L. Ed. 738 (1919) 21

Hall v. Osell, 102 Cal. App. (2d) 849, 228 P. (2d) 293, 3 Avi. 17,493 (App. D. C. 1951) 24

Hartshorn, 13 CAB Rep. 410 25

Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) 21

Kent v. Parker, 8 Terry 151, 89 A. (2d) 133 (Del. 1952) 20

Konantz, 13 CAB Rep. 401 25

TABLE OF CASES CITED (Continued).

Page

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) 21

Maher v. Voss, 9 Terry 45, 98 A. (2d) 499 (Del. 1953) 20

Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) reh. den. 318 U. S. 799, 63 S. Ct. 757, 87 L. Ed. 1163 (1943) 19

Pokora v. Wabash Railway Co., 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149 (1934) 21

Rank v. Metropolitan Edison Co., 370 Pa. 107, 87 A. (2d) 198 (Sup. Ct. 1952) 20

Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. (2d) 493 (1957) 20

Swafford v. Atlantic Coastline R. R. Co., 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955) 21

T. A. T. Flying Service v. Adamson, 47 Ga. App. 108, 169 S. E. 851 (Ct. App. 1933) 20

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944) (Pet. p. 24) 21

Union Trust Company v. Eastern Airlines, 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796 (1955) 20

U. S. v. American Ry. Exp. Co., 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087 (1924) 2

Woschenko v. C. Schmidt & Sons, 2 N. J. 269, 66 A. (2d) 159 (Sup. Ct. 1949) 23, 30

Yoffee v. Pennsylvania Power & Light Company, 385 Pa. 520, 123 A. (2d) 636 (Sup. Ct. 1956) 20

Zotter v. Lehigh Valley R. R. Co., 280 Pa. 14, 124 Atl. 284 (Sup. Ct. 1924) 20

MISCELLANEOUS.

	Page
United States Constitution, Seventh Amendment	13, 22
Civil Air Regulations:	
14 C. F. R. § 1.12	6
14 C. F. R. § 1.16	6
14 C. F. R. §§ 1.30-1.64	6
14 C. F. R. § 3.10	6
14 C. F. R. § 43.65	8, 25
14 C. F. R. § 43.68	25
14 C. F. R. § 60.12	25
14 C. F. R. § 60.30	25
14 C. F. R. §§ 60.40-60.49	8
2 C. J. S. Aerial Navigation, § 21	26
F. R. C. P., Rule 43	35
49 U. S. C.:	
§ 402	6
§ 425(a)	6
§ 551(a)(1)	6
§ 553	6
§ 581	10

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No. 476.

GOLDIE B. PRASHKER, EXECUTRIX OF THE ESTATE OF NATHAN PRASHKER, DECEASED, AND CHOICE EMBROIDERY & LACES, INC.,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION AND ATLANTIC AVIATION CORPORATION,

Respondents.

BRIEF OF BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit has now been reported and is found at 258 F. 2d 602.

B. QUESTION PRESENTED.

The only question presented by the record is whether in this action for negligence, the Court of Appeals has sanctioned a denial of petitioners' right to a jury trial in:

(a) Upholding a directed verdict for Respondents (defendants below) where Petitioners' (plaintiffs below) own evidence conclusively established the

contributory negligence of Prashker (petitioners' decedent) (a complete defense under the applicable Pennsylvania law) and failed completely to establish any negligence on the part of either Respondent; and

(b) Ruling that, in the light of the fact that all airplanes, when subjected to excessive stresses, will disintegrate in the air in the same manner and for the same reasons as the Prashker airplane, and in the light of the fact that all kinds of airplanes are at times subjected to such stresses and do similarly disintegrate, and in the light of other factors, evidence of such accidents does not tend to prove the existence of a design defect.

We do not agree that question 3 set forth in the Petition for Certiorari (p. 3) raises a question for review, since the lower courts did not reach this question at all. We do agree, however, that if the Petition for Certiorari were granted, the question of the effect of the approval and certification of the airplane by the CAA would have to be briefed and argued on the merits since we contend that the judgments of the lower courts are sustainable on this ground.[1]

---

1. The judgment should not be reversed if there is any ground upon which it can be sustained even though not passed upon by the court below. *U. S. v. American Ry. Exp. Co.*, 265 U. S. 425, 435, 44 S. Ct. 560, 68 L. Ed. 1087 (1924); *Bullen v. DeBretteville*, 239 F. (2d) 824 (9th Cir. 1956); *Baric v. Superior Tanning Co.*, 182 F. (2d) 724 (7th Cir. 1950).

C. COUNTER-STATEMENT OF THE CASE.

1. Introduction.

By the very nature of the way petitioners have presented their Statement of the Case it is impossible for this Respondent, without a full Counter-Statement to correct inaccuracies and omissions therein.

This is an action for the destruction of a Model D Beech Bonanza airplane and the death of its pilot, who was the president of a family corporation which had purchased and owned said plane for use in its corporate business. The principal damages sought are under the Pennsylvania Survival Act, and are based primarily on the loss of substantial earnings of the decedent.[2]

The basic contention of petitioners in this case is that the fundamental design of the Bonanza model airplane is unsafe, and that it was this unsafe design coupled with a failure to warn, that caused Prashker to lose control of the airplane when, although he was not capable of flying on instruments, he piloted the plane into instrument weather conditions. There is no claim that any of the plane's materials were defective (80b) or of insufficient strength (8b), or that the plane in any way violated any of the voluminous requirements of the CAA and CAB which govern its design, manufacture, and sale (8b, 70c).

Petitioners place their principal reliance upon tendered proof that the airplane has suffered previous accidents when some of the pilots lost control of the airplane in adverse weather conditions, and upon tendered statistical proof

---

2. Petitioners refer to their action for wrongful death (Pet. p. 5). However, it was conceded by their attorney that no damages had been shown under this part of their claim (165c). No proof of funeral expenses was ever made. ("Pet." refers to Petition for Certiorari. Page references accompanied by letters are to the appendices filed in the Court of Appeals, e.g., 165c. Letter "a" refers to Petitioners' Appendices; letter "b" refers to Respondent Atlantic's Appendix; letter "c" refers to this Respondent Beech's Appendix.)

relating to alleged comparative rates of failure. Petitioners contend that this data demonstrates a special danger in the Model D Beech Bonanza. The tendered proof, although perhaps plausible to one who has not flown an airplane and is not familiar with aeronautics and flying conditions, is without probative merit when considered against the background of flying hazards and aerodynamic theories and practices which underlie this case and were presented to the courts and jury below. And the tendered proof has no bearing whatsoever upon the principal ground of decision in both lower courts—the conclusive showing of decedent's contributory negligence.

This case involves primarily flying conditions of which only flyers have a first hand knowledge and understanding. It can be understood only in the light of testimony by such flyers, and in the light of conceded aerodynamic theories and practice.

Because of the emphasis placed by petitioners upon matters that are apt to be misunderstood by those not familiar with the risks and conditions of flight we are compelled to describe the circumstances of this accident in full and to state the aeronautical principles which underlie this entire case, and which were clearly presented by petitioners' own witnesses to the Court and jury below.[3]

2. Airplane Design Necessarily a Compromise.

As the Court of Appeals recognized in its opinion (Pet. 11a) a commercial airplane is essentially a compromise (8b, 29b-30b, 32b, 35b). Since an airplane must be light enough to get off the ground, and to travel with desirable speed, the strength of its parts must be limited. On the other hand, it must be strong enough to withstand stresses up to a pre-

3. In a desperate effort to bolster their case, petitioners have repeatedly gone outside the record and inserted extraneous matter to influence the Court. Glaring examples of this patent abuse are found in the Petition p. 3 (footnote 1), p. 25 (reference to accidents as to which no proof was tendered by petitioners).

determined limit, and to carry the loads for which it is designed. The skill of the aerodynamicists has not yet devised (and probably never will devise) an airplane light enough to provide efficient transportation which cannot literally be torn apart in mid-air when subjected to strains caused by the pilot's loss of control of the airplane in adverse weather conditions (187a-188a). This danger is especially present when a pilot not qualified to fly on instruments attempts to fly in weather conditions where instruments must be used.

These considerations were readily conceded by petitioners' own attorney in his opening remarks to the jury, where he stated:

> ". . . You can tear the wings off any airplane flying if you put it in a dangerous position, exert extreme loads on it. There isn't an airplane flying that you can't tear apart. And that includes a DC-6, a Constellation, any airplane that one of you may have flown in. You can take the wing off, if it gets into a critical flying attitude, if loads are exerted upon it in excess of what it will stand. *That doesn't mean that those airplanes are not sufficiently strong or that they are badly designed. Any airplane is a compromise.* It can't be too heavy because then it would not fly anything (sic), and things of that sort. . . ." (Plaintiffs' opening, 8b) (Emphasis supplied.)

The evidence subsequently introduced by petitioners (respondents called no witnesses, since there was a directed verdict at the end of petitioners' case) emphasized and reemphasized the fact that, as all pilots know, any airplane can be torn apart in the air if excessive loads are imposed on it. As the case unfolded, it became clear that structural failure in midair was most likely to occur when a pilot not qualified to fly on instruments entered instrument weather ("blind flying") conditions. Loss of control of the air

plane is virtually inevitable under such circumstances, and there usually ensues the imposition of excessive loads in an effort to regain control.

To "assure the highest degree of safety" in air transportation (49 U. S. C. §402) the CAA and CAB have been given by Congress broad, almost dictatorial, power over air transportation including, among other things absolute control of the "design, materials, workmanship, construction, and performance of aircraft, aircraft engines and propellers, as may be required in the interest of safety". (49 U. S. C. § 551(a)(1). See also 49 U. S. C. § 425(a)). A model design such as the Beechcraft Bonanza is not approved by the CAA until the completion of many months of extensive and searching testing, examination and supervision, beginning with the drawing board and ending with the final test flights (82b, 81a-82a, 24c) Contrary to the impression sought to be given in the Petition for Certiorari (pp. 4, 27-28), the issuance of a type certificate not only certifies to compliance with the applicable civil air regulations, it is also official evidence "That the Administrator finds no feature or characteristics of the airplane which renders it unsafe for the category in which it is certificated" (14 C. F. R. §§ 3.10 and 1.12; 25c-26c; see also 23c, 87c-88c). Furthermore, the CAB has ample authority to revoke a type certificate if it afterwards finds the plane to be unsafe (49 U. S. C. § 553; 14 C. F. R. § 1.16; 40c).

A type certificate was issued for the model D-35 the plane type involved in this action (124b). Moreover, the particular plane involved in this action was individually tested in accordance with CAA regulations (14 C. F. R. §§ 1.30-1.64) and an airworthiness certificate was issued for this plane (86b). A special board convened by the CAA found that the Bonanza type airplane was no more difficult to fly on instruments than other similar aircraft (36c, PX 35). Also, the National Advisory Committee for Aeronautics (NACA) test flew the airplane and issued a report

concluding that the airplane was a satisfactory airplane (PX 22; see 52c). Although the CAB has investigated the Bonanza crashes and examined the NACA report it has never deemed it necessary to revoke the type certificate (37c).

3. Instrument Flying (Weather Flying) and Vertigo.

Vertigo, as it applies in this case and to aviation, is a special type of disorientation in space which occurs when the pilot loses all visual frame of reference. When a pilot gets into the clouds or overcast he loses sight of the ground and the horizon, and is confronted with faceless gray matter in every direction (128c-129c). Being airborne, his other senses cannot tell him whether he is flying straight, whether he is flying level, whether he is flying to the right or left or whether he is in a sharp turn and a spiral dive (128c-129c); in fact, his senses will deceive him. The disorientation that ensues is called vertigo. It happens regardless of what type of airplane is involved when a pilot unqualified to use instruments loses his visual frame of reference (162c-163c).

A clear and amusing description of this "aerial vertigo" is found in a United States Navy Booklet (NAVAER 09-80Q-33) which was furnished by Beech to all Bonanza purchasers (including decedent in this case) and is a part of Beech's regular safety program (the pamphlet entitled "Vertigo Sense," a part of Beech's Exhibit No. 4, at 171c).

Instruments have been devised to enable pilots to fly through clouds and the overcast with reasonable safety, but they can be interpreted and used properly only after intensive and prolonged training, and even then only when proficiency is kept up by current practice in the type of plane to be flown (32b-35b). The pilot must be disciplined to ignore and reject what his senses are telling him and to accept unquestionably the evidence of his instruments. Moreover it takes considerable training and continuous practice to learn how to interpret and react to the instruments.

The testimony and the exhibits show what will happen to a pilot who tries to fly on instruments without instrument training or without experience in the airplane which he is flying (36b-39b; PX 13, the pamphlet "G's", at 168c). The pilot may get involved in a procedure known as "chasing instruments". Because of the lag between the reading of the instruments and the actual position of the airplane the airplane gets on a course similar to that of a roller coaster which results in enormous strains being placed upon it, particularly in the dive phase. Or the pilot may get into a power spiral which also puts dangerous loads on the airplane. In either case the probable result is disaster, since excessive loads on the aircraft structure will result in a mid-air disintegration.

Indeed, it is so hazardous to attempt a flight under instrument conditions (i.e., where the pilot has no visual frame of reference) without adequate training that it is made specifically illegal by appropriate Civil Air Regulations (14 C. F. R. § 43.65; see also 14 C. F. R. §§ 60.40-60.49) and any pilot who attempts instrument flight without first completing the proper training, is in violation of the law (46a).

Captain Blakemore, a TWA pilot with approximately 10,000 hours of flying time, and the only pilot called by plaintiffs to testify, stated that if a pilot unqualified to fly on instruments gets involved in instrument weather, there is no question but that he will lose positive control of the airplane and that "regardless of what happens from that point on, only a miracle is going to save him from some type of harm" (46a).

4. "Clean" and "Dirty" Airplanes.

The Beech Bonanza involved in this case is what is known as a "clean" airplane. This means a fast, streamlined airplane with a low amount of drag (18b). "Cleanness" is desirable in airplanes because it results in more economical rapid transportation.

One of the common difficulties experienced by an unqualified pilot who gets into instrument conditions is for the airplane to get into a dive, with the result that attempts to lower the speed of flight produce excessive loads on the airplane's structure and may result in attitudes of the airplane difficult to manage on instruments (17b; PX 6). "The rapidity with which such hazards increase is more pronounced as the cleanness of the airplane increases" (17b; PX 6). A clean airplane will pick up airspeed very quickly without the nose being pushed down very far (36b-37b; 42b). On the other hand, a clean airplane affords added safety in certain other situations (124c-125c).

5. Knowledge of Prashker and Warnings by Beech.

The record is replete with evidence, all undisputed, of warnings by Beech of the dangers inherent in flying a clean airplane in instrument weather conditions. Actually, Prashker had already been apprised of most of this material in the course of his flying training, and so Beech was repeating and re-emphasizing points of which he was already aware.

Thus Prashker was warned, as he indeed already knew, that all airplanes are a compromise, and that any plane might be pulled apart if an unqualified pilot subjected it to stresses and strains through loss of control of the airplane in instrument weather (22b-26b, 29b-32b, 35b). He knew and was warned by Beech of the particular dangers involved in flying in instrument weather by a pilot unqualified to fly on instruments, including the dangers of vertigo (17b, 25b, 32b-33b, 34b-35b, 36b-38b; see PX 6, 7, 8, 13, 17 and 18). A vast amount of safety literature embodying this material had been supplied to Prashker by Beech (13b-15b) pursuant to an extensive safety program undertaken by Beech at its own expense (119c) unparalleled anywhere in the industry (186a). In addition to pointing out the dangers involved when an unqualified pilot attempts to fly in instrument

conditions, this literature emphasized the exceptional danger involved where the plane is aerodynamically clean (17b, 36b-37b, 41b-42b). Indeed, Prashker was specifically aware of the characteristics of clean airplanes as he had had considerable previous experience with airplanes (10b) and was making the typical pilot's natural progression from slower, "dirty" planes to faster, "cleaner" ones (46b).

Prashker was not qualified to fly an airplane on instruments and he knew it (18a-19a). In fact, Prashker admitted over the radio in what were virtually his last words before the crash that he was not "capable of flying instruments" (302a).

6. The Accident.

On October 5, 1953 at 12:09 P. M. Prashker took off from the Allegheny County Airport bound for Cleveland, Ohio on a business trip, accompanied by Harold Weissman. At the time, the ceiling at Allegheny was "estimated" (304a) to be 1800 feet above the ground and the visibility was 4 miles (304a). The weather report showed haze, light rain, temperature 50° and dew point 48° (PX 26; 304a). Prashker nevertheless filed a visual flight rules plan (VFR) which, as we show in our argument (*infra* pp. 23-24) would have taken him within 50 feet of the "estimated" ceiling, and if followed would have constituted a clear violation of law.

The available evidence of the ensuing flight and crash is effectively presented in the coldly objective pages of the Incident Report (PX-26) prepared by the CAA (300a-313a). The statement of the Controller in the Allegheny Tower (309a-312a) summarizes this evidence:

> "1207E Bonanza N2168D called Allegheny Tower by radio and requested taxi and take-off instructions. I cleared Bonanza 68D to taxi Runway 5 or 30, pilot's choice, wind North 10 to 15 and Altimeter 30.00. Bonanza 68D asked for Runway 30 and for detailed instructions as he was unfamiliar with the field. I

issued detailed instructions to Bonanza 68D. Controller Armstrong, who was working the Flight Data Position, required me to find out if N68D would close his flight plan with Cleveland Radio. I requested this information from N68D and the pilot advised that he would close with Cleveland Radio.

"1209E Bonanza 68D requested take-off clearance and I cleared him for take-off on Runway 30. The take off appeared normal in all respects. The aircraft was last observed on a straight out departure about 3 miles Northwest of the field and I advised him to use caution passing through the Greater Pittsburgh area *as they have considerable instrument traffic.*

"1222E to 1226E Bonanza 68D called Allegheny Tower and advised that he was over the city at 2300 feet, *unable to maintain VFR and was climbing to get on top.* I advised N68D that the last tops we had were 3800 feet and suggested that if he was climbing to remain well clear of all airways or get an ATC clearance. The pilot advised that *he was already in the G— D— stuff and was climbing.* Controller Armstrong advised me that Greater Pittsburgh Tower advised that a Jet reported the tops at 33,000 feet and they had nothing on in-between layers. I relayed this to N68D. I then requested the approximate position that N68D was climbing up and he replied that he did not know his position. I then requested of the pilot if he desired to return to the airport, to which the pilot replied that he would, but did not know where he was except that *he had entered the G— Dam— stuff over the city. I asked N68D if he was capable of flying instruments and the pilot replied that he was not qualified.* I then asked N68D if he was VFR and the pilot replied *NO, I cannot see a G— D— thing in this s—.* Controller Armstrong advised me to have the pilot count for a DF steer for Pittsburgh Tower. I did and the pilot counted. Con-

troller Armstrong advised me that Pittsburgh Tower said to steer 225 degrees magnetic. I relayed this heading to N68D. I heard a carrier signal on the radio and then a very crackly voice first which was barely distinguishable and then 2 5. I repeated the steer, but received no acknowledgment. I transmitted to N2168D on all available frequencies in an attempt to reestablish contact with the aircraft but was unsuccessful.

"1228E Controller Armstrong answered the outside telephone and then advised me that a Mrs. Fine reported seeing an aircraft go down between Elizabeth and Monongahela.

* * *

"From the pilot's conversation it was very evident that he was excited and under considerable pressure after he advised that he was in the overcast and throughout the short period that we had radio contact with him.

IVAN L. McCAFFERTY
Ivan L. McCafferty
Airway Operation Specialist"

(Emphasis supplied.)

The plane crashed about 8 miles south and slightly east of Allegheny (63a, 76a). A wing and a stabilizer had come off the plane under positive, upward pressure (61a, 72b, 76b). An examination of the plane after the crash showed that the flaps had not been let down and that the landing gear had not been lowered (21c, 73b), despite warnings Prashker had received to take such precautions (25b, 31b). The examination also showed that Prashker had been flying with the plane trimmed for a slightly nose down attitude (76b-77b).

D. SUMMARY OF ARGUMENT.

I.

Two lower courts sustained the granting of a directed verdict on the ground that fair-minded jurors could not honestly differ that there was contributory negligence which would bar recovery under the applicable Pennsylvania law. The lower Courts, in so holding, clearly applied the proper test in determining whether there was sufficient evidence for the jury, basing their conclusions upon review of a voluminous and highly complicated record. This Court has held, particularly in diversity cases, that where two lower courts have agreed that the evidence of contributory negligence, and the inferences properly to be drawn therefrom, do not warrant submission of such issues to the jury, this Court will accept those findings in the absence of plain error. No such plain error is shown in this case, and therefore, no violation of the Seventh Amendment exists in the direction of the verdict.

II.

The Directed Verdict Was Clearly Correct.

(a) As to contributory negligence, it is agreed by all parties that the plane was torn apart when Prashker lost control of the plane in an overcast. Prashker's negligence in getting into the overcast was clearly shown by a take-off in the face of marginal weather which was threatening to get worse, adoption of a flight route which would take him over the City of Pittsburgh where instrument conditions were likely to prevail, failing to turn around in time to avoid the instrument weather, attempting to climb through the overcast, and failing to lower landing gear and flaps when he first got into instrument conditions. The negligent character of these acts was established by Petitioners' own expert testimony, by Prashker's violation of applicable Civil Air Regulations and by evidence of Prashker's dis-

regard of specific warnings from the respondent Beech. When these are all considered together, the overwhelming picture of Prashker's negligence is gross and shocking.

Petitioners' argument that contributory negligence was not conclusively established because the evidence is consistent with the theory that Prashker found himself trapped in bad weather is refuted by the only expert testimony elicited by Petitioners, which was that Prashker could have seen the weather in time to avoid it, and that bad weather does not close in around a pilot so that he is trapped, if he is exercising due care for his own safety. The District Court specifically ruled that an inference that Prashker had become trapped when the weather closed in around him was not justified on the record and the Court of Appeals took the same view.

Since the subject matter is not within the experience of the ordinary juror, expert testimony controlled this point. In the absence of anything to the contrary this testimony must be taken as conclusive.

(b) As to negligence, petitioners claim a combination of three factors which made the plane especially hazardous to an unwary pilot and a failure to give warning of the alleged special hazards. These three factors are (1) oscillations which allegedly induce vertigo in a pilot; (2) alleged light stick forces which allegedly increase the danger of structural failure; and (3) alleged extremely rapid acceleration in a nose down (dive) position.

As to the oscillations and vertigo, petitioners' testimony shows that vertigo is likely to have occurred regardless of the oscillations. Furthermore, petitioners failed completely to produce a competent expert to establish that the oscillations would produce vertigo, and failed to produce any evidence whatsoever to show that the oscillations were more likely to produce vertigo than oscillations which occur in other airplanes. The only expert produced by petitioners testified about motions in a barany chair and was

unable to state whether or not those motions applied to an airplane. When requested specifically on cross-examination to assume conceded facts about the oscillation characteristics of the Bonanza, *he in effect testified that the oscillations would not produce vertigo.*

As to the claim of light stick forces, there is not a single shred of testimony anywhere in the record to convict these stick forces as a contributing factor to the accident. The only evidence in the record shows heavier stick forces than were required by all available criteria.

As to the rapid accelerations in a nose down position, this characteristic is common to all clean airplanes of high performance, like the one here involved. The ability of this plane to accelerate rapidly in a nose down position was known to its pilot. Documents admittedly sent by Beech to Prashker and admittedly read and discussed by Prashker contained warnings specifically directed to this feature of the airplane. Prashker's own brother testified that Prashker was aware of it.

III.

The evidential rulings as to prior accidents and statistics were correct. The evidence which was refused would not have enabled petitioners to make out a case.

(a) Evidence of prior accidents could not have affected the rulings on contributory negligence. Nor would such evidence have added anything to petitioners' case on the question of negligent design. Petitioners' aerodynamicist was unable to deduce from these accident reports anything more than "a set of circumstances that could get a pilot into very serious trouble."

The prior accidents invariably involved pilots unqualified to fly in instrument conditions, or qualified pilots who flew into conditions of turbulence unlike those of the present case, which are dangerous for any pilot in any plane. In view of the impossibility in the present state of the art of designing an airplane which will take an unqualified pilot

through instrument conditions in safety, the evidence of the prior accidents could not serve as notice or evidence of a dangerous condition beyond that inherent in the design limitations of the airplane and of which Prashker was duly warned.

(b) Similarly evidence of the statistics could not have affected the rulings on contributory negligence nor added anything to petitioners' case on the question of negligent design. After all, the statistics are merely a summary of the accident reports.

The comparisons with other aircraft have no factual basis.

First, the comparison includes airplanes (such as the Piper Cub) which were not designed for and do not fly cross-country and are not of clean design. These airplanes would rarely, if ever, be in a position where they might get involved in weather conditions, and on the rare instances that this might happen their "dirty" design would tend to prevent excessive dive speeds. In point of fact, statistically the Bonanza compares favorably with several other models of clean design.

Second, petitioners are lumping the original model 35 Bonanza and all subsequent models of the Bonanza together. Both lower courts found that the changes between the original 35 model and the model involved in the present action were so great as to justify a finding that they were different airplanes. These changes included a considerable increase in the strength of the wings, so great, in fact, that it led to a change in the CAA category for which the plane was certificated which permitted the later models to do some type of acrobatics not permitted to the original model 35.

There are other reasons for excluding the statistics. First, the evidence shows at least three categories of variables to be involved in these accidents including the pilot, the airplane and the flying conditions. Since these variables are not controllable it is impossible to draw any conclusions

as to any one. And second, the statistics are inadmissible because of a statute which prohibits the use of CAA accident reports as evidence in any suit or action for damages growing out of any matter mentioned in the reports. These accident reports are the basis of the statistics. Since it is claimed that these accidents prove and are notice of defective design, this action grows out of matters mentioned in the reports themselves. The underlying data being inadmissible, the statistics themselves cannot be admitted.

IV.

The decisions below are confined to the facts of the present case, do not adversely affect the rights of other litigants and are not based, implicitly or otherwise, on the findings of an Administrative Agency. Those decisions were based entirely on the conclusive showing of Prashker's contributory negligence and the insufficiency of the evidence of negligence. The lower courts held that fair-minded jurors could not differ on their appraisal of the evidence presented.

Respondents did contend that the CAA and CAB findings should be conclusive, or at the very least presumptive, on the question of respondents' negligence. However, the lower courts did not reach or pass upon that question. There is, therefore, no basis for petitioners' assertion that the lower courts used rulings on evidence as a subterfuge to give effect to the CAA and CAB findings.

V.

Petitioners have built up this record in the hope that with massive data they will be able somehow to deter a court from taking the case from the jury, and will be able to get the sympathy of a jury by overwhelming it with horror stories of prior accidents. *Even in the Petition for Certiorari Plaintiffs are attempting to impress the court*

with accounts of accidents which form no part of the record, and have no relationship whatever to the present case.[4]

The lower courts, after careful examination of the record, have properly found that there was insufficient evidence to justify taking further time of court and jury. In so doing, they have clearly applied the correct legal tests. This court should not spend its valuable time reviewing this record in detail or in considering the narrow questions presented by it.

---

4. For example, petitioners refer to accidents which have occurred since the date of the crash. In this connection, we might refer to SA-328, Civil Aeronautics Board Aircraft Accident Report, file No. 2-004, adopted June 26, 1958 and released July 2, 1958. The Board decision concludes:

> "The Board determines that this accident was caused by the pilot's attempt to fly in weather conditions beyond his level of ability."

E. ARGUMENT.

I. THE UNANIMOUS DECISION OF THE TWO LOWER COURTS ON THE INSUFFICIENCY OF THE EVIDENCE SHOULD NOT BE REVIEWED BY THIS COURT.

The District Court held that "The minds of men could not differ upon the question that the actions of Prashker directly contributed in some degree to the accident"[5] (297a). In so ruling, the court expressly recognized that, "When the question of contributory negligence arises from a state of facts from which reasonable persons might draw different conclusions either as to the facts or the conclusions or inferences drawn from such facts, the question of contributory negligence is for the jury to determine" (296a). Quite clearly the court felt that fair-minded jurors could not honestly differ upon the question of whether Prashker's negligence contributed in some degree to the accident. It would have been futile, and contrary to accepted judicial principles, to proceed further with the trial when plaintiffs' own evidence had so plainly established that they were not entitled to recover.

The test applied by the District Court is eminently correct whether (in a case such as this where jurisdiction is based solely upon diversity of citizenship) the question of the sufficiency of the evidence for the jury is to be governed by Federal law, see *Byrd v. Blue Ridge Cooperative*, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. (2d) 953 (1958) reh. den. 357 U. S. 933, 78 S. Ct. 1366, 2 L. Ed. (2d) 1375 (1958), by the local law of the forum, e.g., *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) reh. den. 318 U. S. 799, 63 S. Ct. 757, 87 L. Ed. 1163 (1943); *Cities*

5. It was conceded that Pennsylvania law is applicable to the defense of contributory negligence, and that under Pennsylvania law there can be no recovery if Prashker's negligence contributed in any degree to the production of the injury complained of.

Service Co. v. Dunlap, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939). The applicable law in all of the jurisdictions involved is in accord with the ruling of the District Court. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 510, 77 S. Ct. 443, 450-451, 1 L. Ed. (2d) 493 (1957); *Kent v. Parker*, 8 Terry 151, 89 A. (2d) 133 (Del. 1952); *Maher v. Voss*, 9 Terry 45, 98 A. (2d) 499 (Del. 1953); *Antonelli v. Tumolo*, 390 Pa. 68, 132 A. (2d) 285 (1957).

The Court of Appeals took the same view as the District Court, agreeing that the evidence would not support an inference which is vital to petitioners' contentions on the issue of contributory negligence (Pet. 7a). The Court, however, feeling that its position on the availability of such inference "may be arguable" and also because the case had been "so thoroughly and well presented," preferred "to rely *also* on an alternative ground for decision" *that the evidence did not show any negligence on the part of Respondent Beech* (Pet. 7a, emphasis supplied).

The entire issue here rests upon the peculiar facts involved in this case, largely undisputed, and the inferences properly to be drawn from these facts. The District Court following three weeks of the presentation of petitioners' case felt that on the question of contributory negligence the minds of men could not differ upon these facts and upon the conclusions and inferences to be drawn from them. On review of the record, three judges of the Third Circuit Court of Appeals unanimously agreed.

This Court is thus being called upon to review the unanimous findings of two lower courts on the sufficiency of the evidence in a voluminous and highly technical and highly specialized record. This Court is not now being called upon to review the judgment of an Appellate Court which has reversed and set aside a lower court jury verdict and judgment thereon as in the cases relied on by Petitioners: *Union Trust Company v. Eastern Airlines*, 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796 (1955) (Pet. p. 24); *Gibson v. Phillips Petroleum Company*, 352 U. S. 874, 77

S. Ct. 16, 1 L. Ed. (2d) 77 (1956) (Pet. p. 24); *Anderson, Adm'x v. Atlantic Coastline Railway Co.*, 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955); *Swafford v. Atlantic Coastline R. R. Co.*, 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955) (Pet. p. 24); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) (Pet. pp. 18, 22) and *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944) (Pet. p. 24). Nor is it called upon to repudiate a rigid judge-made standard of negligence either under Federal statute as in *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) (Pet. p. 18) or under the pre *Erie R. Co. v. Tompkins* federal common law of negligence as in *Pokora v. Wabash Railway Co.*, 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149 (1934) (Pet. p. 24).

It is, therefore, appropriate to apply the two-court rule in this case. Where two lower courts have agreed that the evidence of negligence or contributory negligence, and the inferences which may properly be drawn therefrom, do not warrant submitting such issues to the jury, this Court will accept those findings in the absence of plain error. *Boehmer v. Pa. R. R. Co.*, 252 U. S. 496, 40 S. Ct. 409, 64 L. Ed. 680 (1920); *Gillis v. N. Y., N. H. & H. R. R. Co.*, 249 U. S. 515, 39 S. Ct. 355, 63 L. Ed. 738 (1919); *Erie Railroad Company v. Welsh*, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319 (1916); *Baugham v. N. Y., Phila. & Norfolk R. R.*, 241 U. S. 237, 36 S. Ct. 592, 60 L. Ed. 977 (1916).

There is a strong public policy argument in support of the right of a court to direct a verdict for a defendant when the plaintiff has failed to make a prima facie case. The time of the court, the time of the jurors, that of other litigants and the interests of justice all require that a jury should not be obliged to sit through many more weeks of trial when a plaintiff has already demonstrated his inability to establish his case, and a court should not permit a jury to speculate in a case where the plaintiff has made out such a poor showing that, as a matter of law, it may be said that

he is not entitled to recover. Under these circumstances there certainly cannot be any violation of the Seventh Amendment to the United States Constitution.

The lower courts manifestly recognized and applied the proper test in determining whether there was sufficient evidence for the jury. The application by the lower courts of this test to the facts of this case was not plainly erroneous. In fact, the result reached by the lower courts was absolutely inevitable, and the only possible reasonable result under the evidence presented, as we shall now show.

II. THE DIRECTION OF A VERDICT IN THIS CASE WAS CLEARLY CORRECT.

A. As to Contributory Negligence (Pet. pp. 15-18)

It is agreed by all parties that Prashker flew his plane into instrument weather in which he was unqualified to fly, lost control of the airplane, and as a result imposed heavy loads upon the wings and tail in excess of the limitations for which the plane was designed, and thus ripped off a wing and part of the tail in flight. Petitioners, realizing the strong evidence of contributory negligence inherent in the entire situation, devoted a good part of their case to an attempt to excuse Prashker's conduct. Their argument postulates hypothetical facts which find no support in the record or in any inferences that can fairly be drawn therefrom.

Prashker's conduct can be measured only in terms of warnings he had received, the Civil Air Regulations, and a knowledge of flying which is completely outside the range of experience of the average juror. The case deals with matters entirely foreign to the average juror's experience, such as aviation vertigo, meteorological data as seen in the air and interpreted by weather reports, blind flying, etc. Unlike a ship, train or automobile case, the juror's common sense will not enable him to draw inferences and conclusions

without considerable help from a pilot or someone of equivalent qualifications who can testify as to conditions in the air. Cf. *Woschenko v. C. Schmidt & Sons*, 2 N. J. 269, 66 A. (2d) 159 (Sup. Ct. 1949).

The only pilot called by the Petitioners was William H. Blakemore, a TWA pilot who was also employed as a salesman by respondent Atlantic Aviation Corporation (38a-39a). In addition to some questions regarding Blakemore's slight connection with the sale of the plane here involved to Prashker (39a-40a), Petitioners' counsel qualified Blakemore as an expert pilot (39a) and questioned him on weather conditions between the two airports involved, in an attempt to establish a basis for justifying Prashker's flight under the conditions shown by the evidence (40a-43a). Blakemore's expert pilot testimony is uncontradicted and provides, in addition to the Civil Air Regulations and Respondent Beech's warnings, the only criteria by which to measure Prashker's conduct.

The evidence, considered in the light of Blakemore's testimony and the Civil Air Regulations, establishes conclusively Prashker's negligence in taking off on the fatal flight, in attempting to fly over the City of Pittsburgh, in not turning back in time, in attempting to climb up into the overcast, and in failing to lower flaps and landing gear after entering the overcast.

Prashker was negligent in taking off in the face of weather conditions which he either had not checked, or had ignored. He knew he was not qualified to fly in instrument weather, and had been warned of the dangers (pp. 9-10 *supra*). Yet the weather report showed an estimated ceiling of 1800 feet, horizontal visibility of 4 miles (304a), haze, light rain, and a temperature close to the dew point (PX 26, 304a). The latter factor gave every reason to anticipate the formation of fog and changing weather conditions (122c). Nevertheless Prashker filed a visual flight rules plan giving an indicated altitude (i.e., altitude above sea level) of 3,000 feet, to which he intended to fly (75a) which

translates to 1,750 feet above the airport (which was 1,250 feet above sea level). The flight plan therefore contemplated flying only 50 feet below the reported ceiling, a clear violation of 14 C. F. R. § 60.30 which requires a non-instrument pilot to stay 500 feet vertically and 2,000 feet horizontally away from an overcast (47a-49a). See *Allen*, 13 CAB Rep. 375.

Although the CAA minimums were slightly exceeded Blakemore's testimony established that there are times when it is unsafe for a non-instrument pilot to take off even though the minimum requirements of ceiling and visibility are met (45a). Prashker was clearly negligent either in failing to check the weather or in taking off in the face of the information furnished. *Hall v. Osell*, 102 Cal. App. (2d) 849, 228 P. (2d) 293, 3 Avi. 17,493 (App. D. C. 1951).

Prashker was further negligent in attempting to fly over the City of Pittsburgh, a city over which in 1953 (the time of the crash) there was considerable smoke and haze (43a). Certainly Prashker, who had gone to college there (21a), who claimed Pittsburgh as his residence (11b) and who had previously piloted his own planes in or out of Pittsburgh several times (113b) was aware of the smoke and haze in the Pittsburgh area (49a). If not, he was specially warned at the outset of this very flight by the Tower: "* * * I advised him to use caution passing through the Greater Pittsburgh area as they have considerable instrument traffic" (PX 26; 310a, 306a). Blakemore testified that in any event a prudent pilot in making up his flight plan would have considered the probability of smoke and smog over the city (45a).

Prashker was supremely negligent in allowing himself to become involved in instrument weather and in trying to climb up into the overcast, instead of keeping under it and returning to the airport, or otherwise avoiding it. The Incident Report shows that when Prashker established radio contact with his own airport he was "already in the G—D— stuff" and "was climbing to get on top" (310a). This was

clearly a violation of several Civil Air Regulations: 14 C. F. R. § 43.65 (which prohibits instrument flight by a pilot who does not have an instrument rating, see *Carver*, 13 CAB Rep. 277 and *Konantz*, 13 CAB Rep. 401); 14 C. F. R. § 43.68 (which requires instrument training within the previous six months); and § 60.30 (requiring a non-instrument pilot to stay 500 feet vertically and 2,000 feet horizontally away from an overcast). Blakemore testified that it would be not only a violation of the regulations [6] but that it would be imprudent for a pilot to attempt to climb into an overcast where he does not have an instrument rating (47a-49a).[7]

Finally, Prashker neglected to lower landing gear and flaps (21c, 22c), as he had been advised by respondent Beech to do if he found himself in weather conditions with which he could not cope (25b-27b). He further heightened the danger by having his plane trimmed for a slightly nose down attitude (76b-77b).

It cannot be disputed that the violation of a specific regulation or statute controlling aviation constitutes negli-

---

6. Cf. 14 C. F. R. § 60.12 which prohibits a careless or reckless operation of an aircraft and sets forth as an example of a violation "an operation conducted above a cloud layer in accordance with VFR minimums which results in a pilot becoming involved in instrument flight, unless the pilot possesses a valid instrument rating, the aircraft is equipped properly for instrument flight and all IFR requirements are observed". Prashker was attempting to conduct such an operation by climbing up through the cloud layer. See also *Hartshorn*, 13 CAB Rep. 410.

7. The absurd proposition which was advanced by petitioners for the first time before the Court of Appeals to the effect that the reason Prashker climbed up into the overcast was to get as much space as possible between himself and the ground (Pet. p. 17) is totally unsupported by a shred of evidence anywhere in the record. Petitioners would not have dared to have any witness testify to this ridiculous suggestion in the court below where it could have been exposed on cross-examination. It is hopelessly inconsistent with petitioners' other contention, that Prashker was trying to return to the airport. The only pilot expert called by petitioners described Prashker's conduct as imprudent (47a-49a).

gence *per se* and bars recovery under Pennsylvania law. See *Yoffee v. Pennsylvania Power & Light Company*, 385 Pa. 520, 123 A. (2d) 636 (Sup. Ct. 1956); *T. A. T. Flying Service v. Adamson*, 47 Ga. App. 108, 169 S.E. 851 (Ct. App. 1933); 2 C. J. S. *Aerial Navigation*, § 21.[8]

Petitioners rely upon a presumption of due care. The Pennsylvania decisions clearly hold that the presumption is not applicable where, as here, plaintiffs' own evidence establishes decedent's negligence. *DeFonde v. Keystone Valley Coal Co.*, 386 Pa. 433, 126 A. (2d) 439 (Sup. Ct. 1956); *Zotter v. Lehigh Valley R. R. Co.*, 280 Pa. 14, 124 Atl. 284 (Sup. Ct. 1924); *Rank v. Metropolitan Edison Co.*, 370 Pa. 107, 87 A. (2d) 198 (Sup. Ct. 1952).

The suggestion of Petitioners that after take off Prashker encountered worsening conditions, turned back, and in attempting to return found himself trapped in bad weather (Pet. pp. 16-17) is directly contrary to the evidence and to any inferences or conclusions which may be drawn therefrom. The evidence clearly is to the effect that the instrument weather could have been avoided.

Even if Prashker did turn around, it is clear that he imprudently allowed himself to go too far before doing so. Blakemore's testimony, uncontradicted, establishes that Prashker would have been able to see the instrument weather in time to take means to avoid becoming involved in it (45a-46a, 69b-70b). When petitioners' counsel attempted to discredit this testimony by suggesting to Blakemore that he knew from his own experience that weather can close in on a pilot, Blakemore denied it, and under further questioning stated that he knew of no responsible evidence that weather could close in on a pilot. Blakemore's testimony was consistently to the effect that the pilot can and must avoid the weather conditions either by

8. Cases dealing with whether the conduct of the pilot was sufficiently gross so that his license should be removed or suspended are inapposite.

turning around, by flying under it or by flying around it (48a-50a, 54a-57a).

Blakemore's testimony is further supported by the weather reports, which establish that the weather at the airport was VFR throughout the flight (304a). And Prashker got into trouble over the Greater Pittsburgh area after he was specifically warned, at take off, about "* * * the Greater Pittsburgh area as they have considerable instrument traffic" (PX 26; 306a, 310a). He cannot complain of a trap, or claim emergency, since the situation, especially in view of the warning, was of his own making.

The District Court was, therefore, amply justified in holding that, "It is the undisputed evidence in the case that instrument conditions or instrument weather do not suddenly come upon one but that such conditions can be avoided by either going to one side of such conditions or returning from whence he came" (297a). This was the testimony of petitioners' only pilot expert. Therefore, the Court of Appeals was amply justified in its holding that an inference that bad weather may have closed in on Prashker even though he was exercising due care for his own safety was not available.[9]

The rulings of the courts below were correct. *A fortiori* these rulings certainly were not such a plain error as would justify this Court to ignore the two-court rule to grant certiorari on this narrow question.

---

9. Petitioners ask, "How can the question of contributory negligence be arguable and still not be left for the jury?" (Pet. p. 16.) It was the availability of the inference that weather can close in on a pilot which the court stated "may be arguable". The court "inclined to the view" that the inference was not available and, therefore sustained the ruling of the District Court. The court did not say the question of contributory negligence was arguable. It was not.

B. As to Negligence.

1. Alleged Negligent Design (Pet. pp. 22-24).

The evidence relating to plaintiffs' contentions of negligent design must be thoroughly distorted before the court could come to the conclusion that fair-minded jurors might find that the plane was negligently designed. In fact the Petition for Certiorari is full of such distortions.

The Petition for Certiorari alleges a combination of three characteristics which it is claimed made the Bonanza peculiarly subject to be torn apart by an unwary pilot (pp. 5, 22-23). These three alleged characteristics are: (1) an oscillation characteristic which allegedly would disorient a pilot and make him physically ill (vertigo), (2) alleged light stick forces, and (3) an alleged extremely rapid rate of speed build up in a nose down attitude. There is no evidence whatsoever in the record which can reasonably be said to support factors 1 and 2. As to factor 3, it is admitted that the Bonanza is a high performance airplane of clean design which builds up speed rapidly in a dive. We show *infra* (pp. 32-33) that Prashker was aware of this and that Beech specifically warned him of it. There is no evidence that this characteristic was extreme for an airplane of clean design.

Petitioners failed to produce a competent expert who could establish that the oscillations would produce vertigo, and produced no evidence whatsoever to show that these particular oscillations were more likely to produce vertigo than oscillations which occur in other airplanes.

The testimony of the physiologist produced by petitioners related solely to motions in a barany chair. However, it was agreed that the airplane's oscillations, unlike the barany chair movements testified to, were not more than two or three degrees on either side of a node (46c-47c, 135c-136c). This fact was not even propounded by petitioners to their expert (164c-165c), nor did this expert feel the plaintiffs had asked for an opinion relating to this type

of oscillation (164c). Plaintiffs' expert candidly conceded that he did not know anything about airplanes or whether or not the barany chair tests (he had only observed them 25 years before as a student in medical school) fitted the motions of an airplane (155c-165c).[10] *Indeed this expert testified that short back and forth oscillations such as it was conceded existed in this airplane would tend to negate each other and eliminate any trace of vertigo* (165c).

If we assume, contrary to fact, that the oscillations of the tail of this plane have vertigo-inducing characteristics in instrument conditions, petitioners have nevertheless failed to adduce any evidence that these characteristics were peculiar to the Bonanza. All airplanes have the[re] oscillations to some degree (132c). The fact that the evidence shows that all aircraft do not have precisely the same oscillation characteristics, or pitch to precisely the same degree, provides no basis for drawing adverse inferences as to the Bonanza, or for assuming that vertigo is more likely to occur in the Bonanza than in any other plane.

The undisputed evidence shows that Prashker was aware of the oscillations even before he bought the airplane (47b-48b), that he discussed them with his brother after the purchase (51b), that these oscillations occur only in certain types of rough air (46c, see 50b) and do not affect the stability of the airplane (47c). The National Advisory Committee for Aeronautics which made extensive tests of the Bonanza model and observed the oscillations, nevertheless found the plane to be satisfactory and not unsafe (52c). The CAA, after examining the longitudinal, directional and lateral stability of the Bonanzas, found no unsafe feature since it concluded that there was no need to revoke the type certificate (32c-33c).

---

10. Assuredly plaintiffs were not prevented from engaging somebody especially competent in the field of aviation medicine. There are such experts (159c). Obviously the expert picked by plaintiffs was not competent in this field, and did not pretend to be able to give an opinion as to the effect of airplane oscillations on vertigo (155c-161c, 163c).

Petitioners' only expert on the subject of vertigo was unable to state that the oscillation characteristics of the Bonanza would produce vertigo (163c) and was clearly in no position to compare them with other airplanes. He agreed that vertigo is likely to ensue in any event where a person unfitted for instrument flying is placed in a situation where he must use an instrument to fly (163c). The absence of satisfactory expert testimony leaves the jury with no basis for finding that the oscillations had any tendency, let alone a special tendency to induce vertigo, cf. *Woschenko v. C. Schmidt & Sons*, 2 N. J. 269, 66 A. (2d) 159 (Sup. Ct. 1949).

As to the stick forces, there is no testimony whatsoever that they were in any way a contributing factor in this accident. The Petition for Certiorari does not even cite a record reference. Even Mr. Dommasch, one of plaintiff's experts, did not attempt to link the stick forces to this accident.

The only evidence in the record shows that the Bonanza had stick forces higher than any existing specifications. The stick forces per G are above those required by the National Advisory Committee for Aeronautics, a permanent governmental research organization (55c-56c, 59c-60c) and exceed both the maximum and the minimum required by the military (59c).[11] Actually the plane in the present case was loaded in a way that would have made the stick forces even heavier (57c).[12] The CAA after investigating the stick forces per G, made no decision to revoke the type certificate (31c).

As to nose down acceleration, there is no evidence that once the plane was in a nose down attitude its acceleration

---

11. The suggestion in the Petition for Certiorari (p. 22) that the Bonanza would pick up speed more rapidly than a military fighting plane is astonishing. It is certainly not supported by the record.

12. Petitioners' reference to the disastrous effects of "a light touch on the stick" (p. 5) is wholly unsupported by record references, and contrary to the testimony as references above made show.

was greater than could have been expected of any high performance airplane of clean design. The CAA found no dangerous nose down tendencies in this airplane (28c-29c), and it is undisputed that the airplane does not get into a nose down attitude unless it is pushed there (51c). It is also undisputed that no plane could be certificated by the CAA if it had dangerous tendencies to get into a nose down position (40c).

The documents alluded to by petitioners (Pet. pp. 20 and 21) do not establish or tend to establish anything to the contrary. The excerpt (Pet. p. 23) from the NACA report (PX 22) is a statement that might well be made about any airplane with a clean design. In fact, that report concluded that the airplane was a satisfactory airplane (see 52c). PX 42 is one of many such reports prepared by Beech (221a) and attempts to give actual figures of the nose down acceleration of the Bonanza. These figures were later disproved (218a), and petitioners' counsel demonstrated through his examination of one of Beech's engineers that the figures included in that report were impossible in that they ran counter to physical laws and were an error which Beech had overlooked (219a-221a). It is difficult to see how these admittedly erroneous and impossible figures can possibly be used as the basis for a finding of fact. PX 72 is a report submitted by employees of respondent Beech dealing with the feasibility of dive brakes.[13] Again there is nothing in this report which would indicate that the acceleration in a

13. A contention that the plane should have had dive brakes was alluded to at the trial and was mentioned in the opinion of the Court of Appeals (Pet. 8a). The only evidence on this point was to the effect that the CAB never required dive brakes (29c), that the landing gear itself could be used as a dive brake (130c), that dive brakes were explored by Beech's personnel who concluded that they would be undesirable from a safety standpoint (223a, 225a-226a; PX 22) and that they have never been used in airplanes like the Bonanzas, but only on military planes (129c-130c). Of course, the mere investigation of a possible safety feature does not demonstrate or provide evidence of its desirability.

nose down position arises from any fact other than the plane is a high performance airplane of clean design.

The reference to a rapid nose down pitch and build up of speed associated with it (Pet. p. 23) is just another example of grasping for straws. There was no testimony that this alleged characteristic was a factor in the accident. It was mentioned in an oblique way only on cross-examination, and petitioners did not even consider it of sufficient importance to include it in their printed appendices for the Court of Appeals.

This accident occurred because an unqualified pilot attempted to fly in instrument weather. Admittedly his danger was increased by the fact that the airplane was clean and could pick up speed rapidly. However (as the Court of Appeals pointed out) in view of the warnings given Prashker (*supra* pp. 9-10; *infra* pp. 32-33) he assumed the risk of this characteristic every time he flew subject to the possibility that he might encounter turbulent instrument conditions.

2. Alleged Failure to Warn (Pet. pp. 19-22).

The evidence establishes conclusively that Beech warned Prashker of the dangers of flight (of which every pilot is aware anyway) and that Beech specifically and repeatedly warned him of the very danger which led to this tragic accident, namely the danger of flight under instrument conditions by a pilot not qualified to fly on instruments. Decedent was specifically warned that cleanness of design permits rapid acceleration.

PX 6, entitled "Facts Every Aircraft Owner Should Know" (13b), was admittedly sent to Prashker by Beech and read by Prashker (15b). That booklet specifically warned of the difficulty of anticipating the extent of turbulence in an area of obscure visibility. The booklet stated that the most common difficulty experienced was for the airplane to get into a dive and that the rapidity with which

the hazard increases is more pronounced as the cleanness of the airplane increases (17b). Prashker was aware that the Bonanza was a clean airplane (17b).

PX 13, a booklet entitled "Air Facts" (14b) and furnished to Prashker by Beech (33b), in discussing the dangers of an unqualified pilot getting into instrument conditions, points out: "Since a modern, clean airplane will pick up speed very quickly without the nose being pushed down very far, the situation rapidly gets out of hand" (PX 13 p. 6, found at 168c; 36b).

PX 17, the Beechcraft Bonanza 1953 handbook (15b), admittedly furnished to Prashker by Beech and read by him (41b) states, "The loads which rough air or turbulence can put on a wing at higher speeds is something that must be borne in mind at all times. These problems apply to all aerodynamically-clean airplanes of which the Bonanza is one" (41b-42b). The exhibit further states, "Aerodynamically-clean airplanes will pick up speed rapidly when the nose is dropped . . ." (42b).

Prashker's own brother testified that Prashker was aware that the Bonanza was a clean airplane which would accelerate rapidly in a nose down position, and that Prashker had read and absorbed the warnings of Beech on this point (17b, 34b-35b, 36b-39b). These warnings were a part of the over-all warnings by Beech that pilots unqualified to fly instruments must avoid instrument weather (13b-25b, 29b-38b; see PX 6, 7, 8, 13, 17 and 18).

The warning was specific and undisputed. There is no evidence on which to submit the issue of failure to warn to the jury.

III. EVIDENCE OF PRIOR ACCIDENTS AND STATISTICS WAS PROPERLY EXCLUDED AS IRRELEVANT, AS WELL AS ON OTHER GROUNDS, AND WOULD HAVE ADDED NOTHING TO PETITIONERS' CASE.

A. As to Prior Accidents.

The evidence of the prior accidents could not in any way have changed the ruling as to Prashker's contributory negligence, which the lower Courts found dispositive of the case. Nor could it have added anything to the petitioners' attempted proof of negligent design.

Although petitioners' aerodynamicist[14] testified that he needed the reports to enable him to form an opinion, it is quite apparent from his testimony that all he was able to wring out of these reports was an alleged pattern of a disoriented pilot who, as a result of his disorientation, allowed the nose to drop and the plane to pick up excessive speed, pulling the wings off when he tried to pull out of the dive (248a-251a). As we have already shown in our Statement of Facts, this is undoubtedly a situation of common occurrence in any airplane where a pilot who is not qualified to fly on instruments negligently gets into instrument conditions (pp. 7-8, *supra*). Loss of control naturally may ensue more rapidly in a "clean" airplane (pp. 8-9, *supra*). In fact, this is specifically pointed out in the article "G's" in "Air Facts" for December 1, 1948 (PX 13, p. 6 at 168c), a copy of which was furnished by Beech to every Bonanza purchaser, including Prashker. The evidence of these accidents would therefore add nothing to petitioners' proof. Nevertheless, the lower Court did permit petitioners

14. Petitioners' glowing references to their expert, Dommasch, should be read in the light of what the record actually shows: Dommasch was not a pilot (60c); he ordered no flight tests of any Bonanza (74c); he had never flown in any model Bonanza (60c); he had never done any accident investigation, except for one helicopter accident (64c-65c).

to introduce several such reports for the purpose of attempting to establish notice.

In point of fact, the Court properly excluded the balance of the reports of prior accidents on the ground of irrelevancy. The Court of Appeals succinctly and ably set forth the proper basis for this ruling when it said (Pet. 11a-12a; 258 F. 2d 602 at 608-609):

> "Showing that the planes came apart is not enough because of the compromise required with structural strength in designing an aircraft which will get off the ground. To be relevant on the issue of causation attributable to a design defect the accident reports would have had to show at least that the planes involved had not gone out of control prior to their coming apart, or if they had gone out of control that it had been without the fault of the pilot. The seven reports in evidence—and they may be assumed best to present the plaintiffs' case—invariably involve pilots unqualified to fly under instrument conditions who nonetheless were in such conditions or, in a few instances involving the unadmitted reports, pilots qualified for instrument flight who were in turbulent weather when the accidents occurred. To hold the aircraft responsible on such evidence would be utterly to disregard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified."

Petitioners complain of failure to follow local law. The only local law applicable is that of Delaware, since Rule 43, F. R. C. P. provides that either Federal Law, or the law of the forum applies, whichever one favors reception of the evidence. Delaware law is presumably the same as Federal Law, which requires that the evidence of the prior accidents have some probative merit. The opinion of the Court of Appeals persuasively exposes the lack of such probative merit in this case.

The words "prior accidents", "existence of a dangerous condition" and "causation" do not in themselves have a talismanic effect to open the door to the admission of prior accidents.[15] The occurrence of the prior accidents must be shown to have a tendency to prove notice or the existence of a dangerous condition. The cases cited by petitioners, including the Pennsylvania cases, involve an object which is surrounded by a few clearly invariable or similar circumstances, and involve accidents which ordinarily would not be expected to happen in their setting. Unlike the present case, they do not involve the maneuvering of a delicate mechanism, which requires a high degree of skill and care. Here the unqualified pilot, regardless of the airplane's design or type, can be expected to tear the plane apart if he gets into instrument conditions.

No impartial person could read the prior accident reports and feel that they gave notice of any design defect in the plane. Thus PX 51 relates to a pilot with no instrument rating. PX 52 relates to a pilot who notwithstanding an instrument rating had been adjudged so poor a flyer on instruments that his superior had forbidden him to fly in instrument weather (107c-108c). PX 49 suggests that the pilot was reckless (106c). PX 46 (95c-97c) indicates a violent storm and PX 47 a dangerous thunderhead (100c-101c), dangerous even to a qualified and experienced pilot. PX 48 indicates turbulence and thunderstorm (102c) and PX 52 indicates heavy rain and lightning. PX 47 suggests that the plane may have been improperly maintained and previously damaged (100c), and that the plane was doing "barrel rolls" (99c). The plane in PX 49 did not have adequate instruments for instrument flying (104c-105c).

Virtually every accident plaintiffs offered to prove (260a) occurred under adverse weather conditions where

15. Petitioners' statements, p. 26, complacently arrogating to themselves the triumph of being the first to "pin-point the design of the airplane" as the cause of these accidents should be read in the light of the fact that they have not done so. The testimony showed that the decedent himself was responsible for this accident.

the plane was flown into instrument conditions. Yet of the Beecheraft Bonanza accidents preceding the one in suit (not one of which involved a Model D), in only two instances was the plane known to be piloted by a pilot with an instrument rating and equipped with the proper instruments for flying in instrument weather. Both involved flight into a thunderstorm with moderate to heavy turbulence reported, a danger for any pilot (101c). These reports are no more evidence of notice to the manufacturer of negligence in design or construction than a crash of an automobile is notice to the manufacturer of that vehicle that he has fallen down in some respect.

Dommasch's testimony that the reports were necessary to his analysis carries no weight, for all he could get out of them was some vague kind of notice of "a set of circumstances that could get a pilot into very serious trouble" (251a). Mr. Dommasch also testified that one of the reports (PX 46) which consisted wholly of foreign newspaper clippings was so unreliable that he put "no particular stock in it" (148c), that he did not know that the only instrument pilot in any of these reports (PX 52) had been grounded for incompetence (149c-150c), that he did not recall the testimony indicating that the plane in PX 52 may have been flown into instrument conditions by a student pilot (150c) and that in the remaining five reports in every instance a non-instrument pilot was involved in instrument conditions (155c). The lengths to which Dommasch would go to torture some kind of "notice" out of these reports is dramatized at 265a where notwithstanding the grossest evidence of a pilot's negligence the witness still endeavors to locate other reasons for the crash.

The Court of Appeals also upheld the rulings as to prior accidents as those rulings related to the original model 35 airplane. The Court of Appeals upheld the Court's finding that the changes made between the original model 35 and the D model involved in the present case were

sufficiently great to justify regarding the two models as dissimilar aircraft. This ruling was clearly supported by the record.[16] We do not labor the point as petitioners have not mentioned it in their Petition for Certiorari.

The District Court was also clearly justified in exercising its discretion to limit the number of prior accidents that could be introduced. The exercise of discretion was based upon a consideration of the extent that collateral issues may be introduced, the degree of prejudice that might result and the amount of time to be expended. See *Dimenco v. Pa. R. R. Co.*, 19 F. R. D. 499 (D. C. Del. 1956). No abuse of that discretion is shown in this case.

B. As to Statistics.

Like the evidence of the prior accidents, evidence of the statistics could not in any way change the ruling as to Prashker's contributory negligence, which the lower Courts found dispositive of the case.

Similarly, evidence of the statistics could not have added anything to change the result of petitioners' attempted proof of negligent design. The statistics themselves do not prove bad design any more than a racing car could be shown to be badly designed merely by comparing its accident rate with that of all other cars. We have already shown (*supra* pp. 30-32) that the clean design which admittedly increases in some respects the need for care in instrument weather, cannot form the basis for liability in this case.

The proposed statistical comparison has no factual basis or merit. Petitioners seek to lump together all models

16. When petitioners state, p. 5, that this action "arises out of the 46th almost identical instance of structural failure in the flight of a Bonanza," it should be kept in mind that in every other accident: (1) a different model Bonanza with a different strength was involved; (2) a different pilot was involved; (3) the weather conditions differed; (4) the other surrounding circumstances differed.

of the Bonanza, and to lump together all other single-engine civil airplanes, regardless of clean design or intended use (Pet. p. 14), and to make an over-all comparison.

By comparing the Bonanza, which is used considerably in cross-country flight involving varied weather conditions, with a plane such as the Piper Cub, which almost invariably remains close to the airport and rarely, if ever, encounters instrument weather, petitioners are offering a distorted and meaningless picture. It is like comparing ice boats with sail boats, and saying that ice boats are safer because no ice boat ever overturned in a tropical hurricane.

Furthermore, the changes between the original 35 model, and the D model here involved were, as the Court of Appeals has pointed out in its opinion (Pet. 11a), sufficiently substantial to justify treating the original model and the airplane involved in the present crash as dissimilar airplanes. It is undisputed that these changes involved first an increase in the limit design load factor from 3.8g's to 4.4g's which moved the planes from the CAA's normal category to the utility category for certification purposes, and increased gross weight. This improved the structural strength of the airplane, permitting it to do some types of aerobatics not permitted the original model. The second significant change was to the dihedral and area of the tail which affected the plane's handling characteristics.

If the original model 35 is removed from these statistics, and the same comparison made only for the A, B, C and D models, the figures change drastically in the Bonanza's favor. When separated out, the original model 35 still compares favorably with the Cessna models 190 and 195, airplanes of comparable design, and has a more favorable rate than five other models of airplanes. And the A, B, C and D models show rates which put them approximately in the middle. The plane involved in this case, as noted above, was a model D.

The reason given by the Court of Appeals for excluding these statistics is in any event conclusive. As the Court

pointed out, the statistics tend to prove nothing more than the individual accident reports, and it is extremely dubious whether statistics involving probabilities have any significance when applied to a particular incident (Pet. p. 12a). Any expert who would testify on the statistics in this case would have to concede that structural failure in flight accidents are the product of at least three categories of variables, each of which could be subdivided into many subheadings. These categories are:

(a) The pilot, including his experience, his emotional and physical reactions and his abilities.

(b) The airplane, including the factors which make it difficult or easy to fly, its strength and its maintenance.

(c) The whole complex of flying conditions, including particularly the weather involved and whether or not the area flown over is difficult.

Of course, in order to assign any blame to the airplane arising from statistics of accidents, it would be necessary to control the other two variables. The CAA figures do not and, of course, cannot control any of these variables; hence any statistical result is meaningless.

There is one additional special objection to the admissibility of these statistics. The statistics are predicated upon reports of the CAB. 49 U. S. C. § 581 provides that:

". . . no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports".

Since it is claimed that these accidents prove and are notice of defective design, the action grows out of matters mentioned in the reports themselves. This statute in itself

would prohibit the admission of the reports which constitute the underlying data for the statistics. The underlying data being inadmissible, the statistics which constitute a summary of that underlying data are similarly inadmissible.

For the foregoing reasons the statistics were properly excluded. In any event they failed to supply the proof that is missing as to plaintiffs' claim of negligence and cannot affect the court's ruling as to contributory negligence.

IV. THE DECISION BELOW IS CONFINED TO THE FACTS OF THE PRESENT CASE, DOES NOT ADVERSELY AFFECT THE RIGHTS OF OTHER LITIGANTS AND IS NOT BASED UPON THE FINDINGS OF AN ADMINISTRATIVE AGENCY.

The primary basis of the decisions of the lower courts was the contributory negligence of Prashker as shown by the facts peculiar to this case. There is no reason why litigants who are bringing suits based upon different facts and in entirely different actions should be adversely affected, particularly in those cases which involve application of the law of comparative negligence.[17] Of course, the argument that plaintiffs in other cases will not be able to recover unless they can rely on improper or irrelevant evidence should not move this Court to permit these petitioners to rely on improper or irrelevant evidence.

---

17. This Court may be interested to know that the pending cases referred to on page 26 of the Petition should be regarded as a group, and not as the separate contentions of numerous lawyers. One or both of the attorneys for the Petitioners in this case is involved in every one of those cases, either officially or unofficially, with the exception of the Weissman case. Weissman was a passenger in the Prashker plane, and his estate being unable to get service on Prashker's Estate in Delaware, in the action referred to by Petitioners in which that Estate is a named defendant, has sued Prashker's Estate in Pittsburgh on the theory that Prashker's negligence was the cause of this crash, and has recovered a very substantial verdict. In the Cleminshaw case, although neither of these attorneys are of record, Mr. Kreindler has taken depositions for the plaintiff, and we are advised he will try the case if it is tried.

As to negligence, the Court of Appeals merely held that the proof was insufficient and did not establish any negligent design or failure to warn. Of course if other litigants make a similar contention and fail to produce evidence other than that produced by the present petitioners, their case will fail, but it will fail for lack of proof, and not because of limitations imposed by this case.

Petitioners' argument that the decision of the Courts below was based upon findings of the CAA is entirely unsupported. Their suggestion that the Courts below used evidence rulings as a subterfuge is a gratuitous insult to a very fine District Court Judge and to the three judges of the Third Circuit who unanimously affirmed his decision. It is true that we took the position in the Courts below that Congress had given to the CAA and the CAB exclusive control over the design of airplanes flown in the United States, and that to permit a jury to overrule the findings of those agencies on airplane design would produce chaos and be contrary to the purposes of the Civil Aeronautics Act. We also argued that the certification established a presumption of due care which could not be overcome on the basis of the obscure and contradictory testimony phrased in indefinite and speculative terms by men who had never flown an airplane or witnessed a flight test of this type of airplane (74c, 72c, 160a). We do not agree that acceptance by the lower Courts of either of these contentions would have been to invite quick reversal by this court, but we do not elaborate this point here as it clearly formed no part of the decisions below. Nor can we agree that the Court of Appeals "expressed great interest in this proposition in its questions to counsel on the argument below" (Pet. p. 26). Of course, if certiorari were granted, we would again urge these arguments as a further ground for sustaining the judgments of the courts below.

The Court should not grant certiorari to review a question not presented by the record.

F. CONCLUSION.

The whole tone of the Petition for Certiorari is shrill and strident. In a desperate attempt to overcome the lower Courts' decisions which have seen through the insubstantiality and insufficiency of the vast amount of materials presented by the petitioners, petitioners have relied heavily upon extra legal reasons and facts not included in the record. Their arguments include unjustified innuendos about the lower Court judges.

Petitioners have built up this record in the hope that with massive data they will be able somehow to deter a court from taking the case from the jury and will be able to get the sympathy of the jury by overwhelming it with horror stories of prior accidents. Even now they are seeking to impress this court with slanted accounts of accidents, the circumstances of which form no part of the record.

Both lower Courts after a careful examination of the record have properly found that there was insufficient evidence to justify taking further time of court and jury. In so doing they have clearly applied the correct legal tests. This court should not spend its valuable time reviewing this record in detail and the numerous narrow questions presented by it.

The Petition for Certiorari should be denied.

Respectfully submitted,

E. N. CARPENTER, II,
J. WELLES HENDERSON, JR.,
LOUIS J. FINGER,
ROBERT E. JONES,
WILLIAM E. WIGGIN,
Counsel for Respondent
Beech Aircraft Corporation.